Supreme Court, U.S.
FILED
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JAMES H. NEAL,

Petitioner,

v.

DISTRICT OF COLUMBIA
and
JOHN LATTIMORE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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May 11, 1998

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APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 9, 1997 Decided December 16, 1997

No. 96-7187

JAMES H. NEAL,
APPELLANT

v.

DISTRICT OF COLUMBIA AND JOHN LATTIMORE,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 94cv01528)

Daniel M. Schember argued the causes and filed the briefs for appellant. *Alake Johnson-Ford* entered an appearance.

Mary L. Wilson, Assistant Corporation Counsel, argued the cause for the District of Columbia, with whom *Jo Anne Robinson*, Interim Corporation Counsel at the time the brief was filed, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief.

Jonathan J. Frankel argued the cause for *amicus curiae* American Civil Liberties Union of the National Capital Area, with whom *Stephen H. Sachs* and *Arthur B. Spitzer* were on the brief.

Before: WALD, HENDERSON and GARLAND, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* Wald.

WALD, *Circuit Judge*: This is a companion case to *Brown v. Plaut*, 1997 U.S. App. LEXIS 35282, No. 96-7027 (D.C. Cir. Dec. 16, 1997). Because our opinion in *Brown* addresses many of the same issues raised in this case, we will make frequent reference to that opinion.

Plaintiff James H. Neal ("Neal") was an inmate at the District of Columbia's (the "District's") prison at Lorton during all times relevant to this action. He seeks to recover damages from the District for holding him against his wishes and without due process in "voluntary protective custody," a regime of specially restricted custody for prisoners whose personal safety is in danger, for a period of six months. The district court dismissed Neal's action for reasons which we find are not persuasive; the District argues nonetheless this dismissal should be affirmed. We find that, under the analysis mandated by *Sandin v. Conner*, 515 U.S. 472, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995), Neal had no liberty interest in remaining free of the special conditions of detention imposed upon him, and therefore affirm the dismissal.

I. BACKGROUND

Neal was convicted in 1987 in D.C. Superior Court of a number of offenses, including multiple counts of robbery, and sentenced to 49 to 147 years' imprisonment. He was initially

placed at Lorton, then transferred to the federal prison in Leavenworth, Kansas, and later transferred back to Lorton in March 1992. The federal Bureau of Prisons transfer forms stated that Neal had a significant history of violence (he had allegedly tried to choke a prison guard) and that he should be considered an escape risk based on the length of his sentence. Accordingly, Neal was placed at Lorton's Maximum Security Facility, a decision that Neal says in a declaration filed in this action that he did not oppose. On March 31, 1992, at his initial hearing for housing classification at the Maximum Security Facility, Neal asked to be placed in voluntary protective custody to allow him to "become acquainted with the conditions and routine" at the facility. Prison officials obliged, and placed him in voluntary protective custody in Cellblock 1 of the Maximum Security Facility.

Voluntary protective custody is one species of administrative segregation; the other major category is involuntary protective custody, which is reserved for prisoners who present an escape risk or who pose a danger to themselves or others. D.C. Mun. Regs. tit. 28, §§ 521.4, 521.10, 521.11 (1987).[1] Prison regulations require that all placements in administrative segregation be reviewed every thirty days. *Id.*, § 527.1. Neal was scheduled for a review of his housing placement on April 30. When that review did not occur, and no other review was scheduled, he submitted written requests for a review in October and November 1992. On December 1, 1992, he submitted a written request for "placement in general population." On March 24, 1993, the Classification Board, charged with reviewing prisoners' custody levels, recommended that Neal be moved to medium

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[1] Administrative segregation may also be used to hold an inmate prior to a housing hearing or adjustment hearing. *Id.*, § 521.2.

security custody, but, for reasons unknown, this recommendation was never implemented. Neal wrote letters on March 29 and April 11, 1993, complaining that he had not received appropriate reviews of his placement in protective custody, and asserting that he wished to be moved to the general population at the Maximum Security Facility. On June 21, 1993, Neal was stabbed, and removed from the prison to an outside hospital. On his return to the prison, Neal voluntarily entered protective custody for a time, and then was returned to the general population of the Maximum Security Facility.

Neal filed a pro se complaint on July 14, 1994, claiming that the District's failure to release him from protective custody for six months violated the Due Process Clause and the D.C. regulations. (These regulations are referred to by the parties by the name of the statute approving them, the Lorton Regulations Approval Act ("LRAA").) The District filed a motion to dismiss or in the alternative for summary judgment on a number of grounds, one of which was that the LRAA did not create a private right of action. The district court denied the motion on all counts. It noted, however, that the question of whether the LRAA created a private right of action was a complex one, and requested further briefing.

While Neal's case was pending, the Supreme Court decided *Sandin v. Conner*, 515 U.S. 472, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995), finding that state laws and regulations governing prisons may only create a liberty interest for due process purposes if the alleged deprivation constitutes "atypical and significant hardship." *Id.* at 484. The parties filed supplemental pleadings as to *Sandin*'s application to Neal's case, and the district court found that, on the basis of a comparison between conditions in protective custody and those in the general population at the Maximum Security

Facility, the conditions Neal had experienced in protective custody did amount to an atypical and significant hardship.

The district court then issued a memorandum deciding the LRAA question. It concluded that the question of whether the LRAA gives rise to a private cause of action was "complex" and that no court to date had awarded damages based on an LRAA violation. The district court stated that Neal had conceded that, absent the LRAA, he would not be able to bring a section 1983 action. It then found that comity dictated that the District of Columbia's courts be allowed to decide whether the LRAA creates a private right of action in the first instance, and dismissed Neal's entire suit. *See Neal v. District of Columbia*, 931 F. Supp. 16, 17 (D.D.C. 1996). Neal appeals from this order.

II. ANALYSIS

On appeal, the District presents a number of arguments for affirming the district court's decision to dismiss Neal's section 1983 action. The most serious is that, under *Sandin*, 515 U.S. 472, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995), Neal did not have a liberty interest in avoiding his placement in administrative segregation. Because we agree with this one, we do not reach the others.

Before addressing *Sandin*, however, we briefly discuss the reasons given by the district court for its decision. The district court mistakenly assumed that, if a state law does not create a private cause of action, then it cannot support an action under section 1983. But to bring an action under section 1983 for a violation of the Due Process Clause, Neal need only establish that he has been deprived of a protected interest (here, a liberty interest) without due process. Under the law as it stood before *Sandin* was decided, Neal could have demonstrated this by showing that the relevant state laws and

regulations sufficiently constrained the discretion of state officials to establish the existence of a liberty interest. *See Brown*, slip op. at 9. Since *Sandin*, Neal must show that he has been subjected to an "atypical and significant hardship ... in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484.[2] At neither time, however, did the test for the existence of a liberty interest turn on whether the relevant state laws create a private cause of action.

We now turn to *Sandin*. In the companion *Brown* case, we concluded that the application of *Sandin* raised difficult questions which we thought it unnecessary to answer. In this case, we need not reach those questions, as Neal cannot establish the existence of a liberty interest under any plausible reading of *Sandin*.

Neal avers that he involuntarily spent six months in "voluntary" protective custody, beginning at the point he asked in writing on December 1, 1992, to leave voluntary protective custody, and ending when he left the administrative segregation unit on June 21, 1993, for the hospital.[3] In

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[2] As we note in *Brown*, after *Sandin* Neal might still need also to show that relevant state laws and regulations contain language constraining the discretion of state officials. *See Brown*, slip op. at 12.

[3] The LRAA states that a prisoner in voluntary protective custody who makes a written request to leave that status "shall be released at once from protective custody." D.C. Mun. Regs. tit. 28, § 521.12 (1987). The LRAA permits an inmate who asks to leave voluntary protective custody to be placed instead in involuntary protective custody if findings are made that the inmate is a danger to himself or others or presents an escape risk. *See id.*, §§ 521.4, 521.12. The District does not contend that any such findings were made.

Cellblock 1, where Neal was held during that period, he was allowed to leave his cell for nine hours a day three days a week, for six and a half hours (or longer if he had a visitor) for two days a week, and for five and six hours respectively on the remaining two days. He was allowed a total of eight hours a week outdoors, in a small courtyard. He did not have easy access to the gym, mailroom, law library, or medical unit (although other arrangements were made for provision of these services), and he could not work at a prison job.

Neal contends that the appropriate standard for determining whether the deprivation he suffered was "atypical and significant" is to compare his circumstances to those of the general prison population from which he was removed. *Cf. Brown*, slip op. at 10-12. Even by that standard, however, Neal fails to meet the *Sandin* test. Had he remained a part of the general population at the Maximum Security Facility, Neal would have received at least 141/2 hours a day of out-of cell time, and 171/2 hours on Fridays and Saturdays. He would have been allowed 14 hours a week outdoors, some 22 hours a week of work, and easy access to the gym, mailroom, law library, and medical unit. His placement in administrative segregation thus cost him approximately half of his out of-cell time, eliminated his access to employment, and restricted his access to prison facilities, all over a six-month period. This deprivation is comparable to that at issue in *Sandin*; although the deprivation in *Sandin* lasted only thirty days, it was considerably more severe, involving (for instance) a reduction from between eight and twelve hours a day of out-of-cell time to fifty minutes. *Sandin*, 515 U.S. at 486 & n.8. It follows that, even under the reading of *Sandin* he himself proposes, Neal had no liberty interest in avoiding his treatment at the hands of Lorton's authorities, and so has no claim under the

Due Process Clause. We therefore affirm the dismissal of Neal's due process claim.[4]

There remains Neal's claim under the LRAA. Although it is unclear on what basis the district court originally dismissed this claim, Neal concedes that, if the district court's dismissal of his section 1983 claim was proper, it would also have been proper for the district court to dismiss his claim under D.C. law for lack of jurisdiction. *See* 28 U.S.C. § 1367(c)(3).[5] We thus affirm the district court's dismissal of this claim.

The decision of the district court is therefore affirmed.

So ordered.

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[4] Although we find that the District's alleged treatment of Neal does not rise to the level of a violation of the Constitution, that does not mean that we endorse it. We do not know from the record whether the District had any valid reason for keeping Neal for six months in "voluntary" protective custody against his will, and why it denied him any process at all.

[5] Neal may, of course, pursue his LRAA claim in the courts of the District of Columbia. Dismissals for lack of supplemental jurisdiction are without prejudice, and the limitations period for a claim dismissed for this reason is tolled "while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. § 1367(d).

APPENDIX B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MANDATE
Pursuant to the provisions of
Fed. R. App. Pro 41(a)
ISSUED: 2/19/98
BY: E. Brown, Deputy Clerk

No. 96-7187 **September Term, 1997**

James H. Neal,

Appellant

v.

District of Columbia and John Lattimore,

Appellees

United States Court of Appeals
For the District of Columbia Circuit
FILED DEC 16 1997

Appeal from the United States District Court
for the District of Columbia
(No. 94cv01528)

Before: WALD, HENDERSON and GARLAND, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Deputy Clerk

Date: December 16, 1997

Opinion for the Court filed by Circuit Judge Wald.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED JUL 16 1996
Nancy Mayer-Whittington,
Clerk U.S. District Court

JAMES NEAL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 94-01528
DISTRICT OF COLUMBIA, et al.	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on Defendants' motion for summary judgment. Plaintiff brought suit against the District of Columbia and John Lattimore, Administrator of Lorton under 42 U.S.C. § 1983. He alleged that Defendants violated his rights under the Fourteenth Amendment by holding him in involuntary protective custody after he had requested to be released from voluntary protective custody

without making a determination that he was either an escape risk, a threat to others or faced a threat from others.[1]

Plaintiff also brought state claims alleging that the two defendants are jointly and severally liable under the Lorton Regulation Approval Act of 1982 ("LRAA") for holding him in administrative segregation without making the necessary findings and for failing to provide both an initial hearing and periodic housing reviews.

Plaintiff alleges that defendants Lattimore and the District are jointly and severally liable for holding him in involuntary protective custody from December 1, 1992 to June 21, 1993 without making the appropriate findings required by the LRAA.[2] and that defendants Lattimore and the District are jointly and severally liable under LRAA § 207 for holding him in involuntary protective custody from April 30, 1992 (the date Neal was supposed to receive his first periodic housing review after his initial placement in administrative segregation) to June 21, 1993 without holding periodic housing hearings.

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[1] Plaintiff had requested on December 1, 1992 to be released from protective custody. He alleges that he was improperly held until June 21, 1993.

[2] Plaintiff specifically alleges violations of LRAA §§ 200.4, 201.7 see supra and 206.1 ("If, after a hearing, the Board determines that the resident should be placed in segregation the Board must prepare within three (3) working days of the hearing, a written statement containing the Board's decision and the factual information upon which the decision is based.")

On June 12, 1995, this Court handed down a Memorandum Opinion and Order in this matter. In that decision, the Court examined the issue of whether the LRAA creates a private right of action:

> Neither party has adequately briefed the state law questions. It is not clear whether the LRAA even creates a private right of action. If the LRAA does create a private right of action, the parties have not addressed whether plaintiff must exhaust any administrative procedures before bringing a claim under the LRAA. Until the parties address these questions, the Court cannot determine whether Mr. Neal has a state law cause of action and, if so, whether this court will exercise supplemental jurisdiction under 28 U.S.C. §1367. (Mem. Op. at p. 17)

The Court directed the parties to fully brief these issues. After reviewing the oral and written submissions of both parties, the Court is not satisfied that the parties have adequately addressed this issue. This is through no fault of the parties. The issues before this Court are complex. To date, no court has awarded damages based on a violation of the LRAA or even decided the issue of whether damages are available under the LRAA. (Plaintiff's Reply Brief at p. 3). The D.C. Council has recently adopted a resolution clarifying its intent in passing the LRAA, by noting that even injunctive relief should not be available (except in certain limited circumstances not applicable here) for LRAA violations. See Resolution 11-198 In the Council of the District of Columbia January 4, 1996) Indeed, in a recently decided case, the Court of Appeals of this circuit has held that the LRAA does not "give rise to a protected liberty interest..." Blango v. Barry, No. 95-7130 (D.C. Cir., May 9, 1996).

Plaintiff's case is based squarely upon the LRAA, a regulation enacted by the Council of the District of Columbia. Without this regulation, Plaintiff conceded that he would have no standing to bring his Section 1983 action. The District of Columbia passed, implemented and enforces the LRAA. Comity strongly weighs in favor of having the District of Columbia Courts in the first instance interpret the LRAA and decide whether the District of Columbia intended to create a private right of action, and if so, what remedies, monetary or otherwise, are available to aggrieved parties.

Accordingly, the case will be dismissed in order to allow the Plaintiff to pursue his cause of action through the District of Columbia's administrative or judicial processes. This Court fears that if it enters the fray at this stage, the Federal Courts will be flooded with untold numbers of prisoner damage cases alleging violations of the LRAA, a creation of local government.[3] The District of Columbia has a fair and impartial court system created under Article One of the Constitution of the United States. It is the appropriate forum to decide the issues presented in this matter and award damages under appropriate circumstances.

CONCLUSION

Since Plaintiff's action is cognizable in Federal Court solely because of the LRAA, a regulation adopted by the Council of the District of Columbia, the prudent course to follow in this case is to refrain from becoming a prisoners "damage court" and allow the Courts and the administrative processes of the District of Columbia to deal with prisoner damage claims arising under the LRAA. Plaintiff's action will be dismissed to

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[3] The Court's decision in this matter is limited to after the fact damage actions.

allow him to pursue his claim for damages through the District of Columbia's judicial and administrative processes.

DATE: 7/16/96

/s/ Stanley Sporkin
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED JUL 16 1996
Nancy Mayer-Whittington,
Clerk U.S. District Court

JAMES NEAL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 94-01528
DISTRICT OF COLUMBIA, et al.	)	(Stanley Sporkin)
	)	
	)	
Defendants.	)	

ORDER

For the reasons stated in its memorandum opinion of this date, the Court hereby

ORDERS that Plaintiff's Complaint be **DISMISSED**, without prejudice.

DATE: 7/16/96

/s/ Stanley Sporkin
United States District Court

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED NOV 21 1995
Nancy Mayer-Whittington,
Clerk U.S. District Court

JAMES NEAL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 94-01528
DISTRICT OF COLUMBIA, et al.	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on Defendants' motion for reconsideration. Plaintiff brought suit against the District of Columbia and John Lattimore, Administrator of Lorton under 42 U.S.C. § 1983. He alleged that Defendants violated his rights under the Fourteenth Amendment by holding him in involuntary protective custody after he had requested to be released from voluntary protective custody without making a

determination that he was either an escape risk, a threat to others or faced a threat from others.[1]

Plaintiff also brought state claims alleging that the two defendants are jointly and severally liable under the Lorton Regulation Approval Act of 1982 ("LRAA") for holding him in administrative segregation without making the necessary findings and for failing to provide both an initial hearing and periodic housing reviews. On June 12, 1995, this Court handed down a Memorandum Opinion and Order in this matter. In that decision, the Court held that the Plaintiff had identified a Constitutionally protected liberty interest and ordered the parties to brief the remaining issue of whether the LRAA created a private right of action such that the Defendants may be held liable for monetary damages under 42 U.S.C. § 1983.

On June 19, 1995, the Supreme Court issued its decision in Sandin v. Conner, et al., 115 S. Ct. 2293 (1995). That decision altered the analysis used in examining whether or not a state prison regulation creates a liberty interest recognized by the Constitution. There are two issues before the Court; 1) Does the Supreme Court's analysis of 14th Amendment liberty interests in Sandin require this Court to revise its Memorandum Opinion and Order issued in this matter and 2) Whether the LRAA creates a Private Right of Action.

ANALYSIS

I) Defendant's Motion for Reconsideration

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[1] Plaintiff had requested on December 1, 1992 to be released from protective custody. He alleges that he was improperly held until June 21, 1993.

Defendants argue that the decision in Sandin removes any federal liberty interest in "any housing classification at the maximum security facility" (emphasis in the original). This Court finds nothing in the Sandin decision that compels it to disturb the original Memorandum Opinion. In Sandin the Supreme Court said:

> We hold that [plaintiff's] discipline in segregated confinement, did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest. The record shows that, at the time of [plaintiff's] punishment, disciplinary segregation, *** mirrored those conditions imposed upon inmates in administrative segregation and protective custody. *** [Plaintiff's] confinement did not exceed similar, but totally discretionary confinement in either duration or degree of restriction" Sandin at 2301

Sandin is readily distinguishable. Unlike the plaintiff in Sandin, the Plaintiff before this Court was not subject to disciplinary segregation of any kind. On March 31, 1992, Plaintiff had his initial classification hearing at Lorton. At **Plaintiff's request**, he was placed in administrative segregation in Cellblock #1.[2] In Sandin, the Supreme Court compared disciplinary segregation with administrative segregation and protective custody. This Court must compare improper administrative segregation with the

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[2] Lorton Regulations Approval Act of 1982 (LRAA) §201.6 states, "Voluntary protective custody is the placement of a resident in administrative segregation at the request of the resident."

conditions of the general prison population. Prisoners in administrative segregation[3] face more restrictive conditions than those in the general population. They spend more hours per day confined in their cell and fewer hours out of doors. In addition, while general population prisoners may leave their cells to work, administrative segregation prisoners may not. Thus, the conditions imposed on Plaintiff represented a significant deprivation from the conditions in the general population.

In addition, in Sandin, imposition of the segregation in question "mirrored" administrative segregation or protective custody that was "totally discretionary." This is not the case here. LRAA § 201.7 provides:

> If a resident in voluntary protective custody provides the Department with a written statement that the resident no longer wishes to remain in protective custody, the resident shall be released at once from protective custody; Provided, that a resident who requests such a release may be placed in involuntary protective custody under the provision of this chapter for such involuntary placement.

(emphasis added). LRAA § 201.2 states that "[n]o resident may be held in administrative segregation for more than three (3) days without a hearing except as specifically provided in this chapter." Looking at LRAA § 201.2 and § 201.7 together, it is clear that a prisoner who requests release from

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[3] Both voluntary and involuntary protective custody are forms of administrative segregation. LRAA §§ 201.5 and 201.6. Prisoners in administrative segregation are held separately from those in the general prison population.

voluntary protective custody may not be held in involuntary protective custody for more than three days without receiving a hearing.

The LRAA establishes certain conditions that must be met before a resident may be held involuntarily in administrative segregation. A resident may not be placed involuntarily in administrative segregation unless he is found to be a "clear and present danger to the safety of others," or a "definite escape risk," or if the resident is "found to be in danger from a clear and present threat to the resident's safety," LRAA §§ 200.2, 200.3 and 200.4. In addition, LRAA § 202.4 further specifies how to determine if a resident is a "clear and present danger to others," or "is in danger from a clear and present threat from others." LRAA § 202.5 sets forth certain specific means by which a resident may be found to be an escape risk (e.g. "The resident possessed instruments designed for use in an escape.")

LRAA § 207.1 calls for thirty day placement reviews for residents in administrative segregation and LRAA § 207.3 permits the resident to be present at every third review (i.e. every ninety days). Despite these rules, plaintiff received no review of his placement in administrative segregation from March 31, 1992 through mid-June, 1993.

The LRAA does give the housing board some discretion in <u>how</u> it determines whether the resident is an escape risk. But the housing board must still determine that the defendant is an escape risk. Thus, the regulations at issue here require that certain procedures must be followed. They were not followed in this case.

CONCLUSION

The Court finds that because Plaintiff was not subject to disciplinary segregation and the LRAA procedures used for determining whether to continue administrative segregation were non-discretionary, Sandin is distinguishable. Defendants' motion for reconsideration will be denied.

A Status Conference will be called in this matter to determine how to proceed with the Plaintiff's remaining claims under §1983 and state law.

DATE: 11/20/95

/s/
Stanley Sporkin
United States District Court

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
NOV 21, 1995
Nancy Mayer-Whittington,
Clerk U.S. District Court

JAMES NEAL	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 94-1528
DISTRICT OF COLUMBIA, et al.	)	(Stanley Sporkin)
	)	
	)	
Defendants.	)	

ORDER

For the reasons stated in its memorandum opinion of this date, the Court hereby

ORDERS that Defendants' motion for reconsideration be **DENIED**.

DATE: 11/20/95

/s/
Stanley Sporkin
United States District Court

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
JUN 12, 1995
Clerk U.S. District Court
District of Columbia

JAMES NEAL	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 94-1528
DISTRICT OF COLUMBIA, et al.	)	(Stanley Sporkin)
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on plaintiff's motion for summary judgment and defendants' motion to dismiss, or in the alternative for summary judgment. There are two main issues in this case: 1) does the Lorton Regulations Approval Act of 1982 ("LRAA") create a Constitutionally protected liberty interest in a prisoner's being placed in and released from administrative segregation, and 2) whether there was a custom or policy by the District of Columbia that violated that interest.

For the reasons outlined below, the Court finds that the LRAA does create a Constitutionally protected liberty interest

that must be observed in placing and releasing prisoners from administrative segregation. The Court finds it cannot decide on summary judgment, based on the record before it, whether there was a "pattern or practice" such that the District may be held liable for monetary damages under 42 U.S.C. § 1983.

I. Background

Plaintiff is serving consecutive sentences for his DC Superior Court convictions for robbery and unauthorized use of a vehicle. On March 16, 1992 it was recommended that plaintiff be transferred from the Occoquan facility to Lorton, a maximum security facility. On March 31, 1992 plaintiff had his initial classification hearing at Lorton and was placed in administrative segregation in Cellblock #1 on his request.[1]

Prisoners in administrative segregation[2] face more restrictive conditions than those in the general population. They spend more hours per day confined in their cell and fewer hours out of doors. In addition, while general population prisoners may leave their cells to work, administrative segregation prisoners may not.

LRAA § 207.1 calls for thirty day placement reviews for residents in administrative segregation and LRAA § 207.3

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[1] Lorton Regulations Approval Act of 1982 (LRAA) § 201.6 states, "Voluntary protective custody is the placement of a resident in administrative segregation at the request of the resident."

[2] Both voluntary and involuntary protective custody are forms of administrative segregation. LRAA §§ 201.5 and 201.6. Prisoners in administrative segregation are held separately from those in the general prison population.

permits the resident to be present at every third review (i.e. every ninety days). Despite these rules, plaintiff received no review of his placement in administrative segregation from March 31, 1992 through mid-June, 1993.[3]

In October, 1992 plaintiff began submitting monthly requests to the hearing board for a 30 or 90 day review. Defendants held no hearing. On December 1, 1992 plaintiff submitted another request in which he not only asked for a housing review, but he also stated that he would "like to be reviewed for possible placement in general population." Pl's Motion for Partial Summary Judgment Ex. 3. On January 5, 1993 plaintiff even more explicitly requested that he "be released from segregation."[4]

LRAA § 201.7 states:

> If a resident in voluntary protective custody provides the Department with a written statement that the resident no longer wishes to

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[3] The Classification Board reviewed plaintiff's custody level on March 24, 1993 and found that he should remain in maximum security. No consideration was given to plaintiff's request to be removed from administrative segregation. Declaration of James Neal ¶ 22.

[4] Plaintiff submitted a request for a housing review and release from administrative segregation again in February 1993. In March of 1993 he submitted a similar written request to Administrator John W. Lattimore and spoke with him in person about it at sick call. On April 11, 1993 plaintiff submitted a written grievance regarding his failure to receive 30 and 90 day housing reviews. Defendants did not provide a hearing in response to plaintiff's requests or his grievance.

> remain in protective custody, the resident shall be released at once from protective custody; Provided, that a resident who requests such a release may be placed in involuntary protective custody under the provision of this chapter for such involuntary placement.

On March 24, 1993 the classification board reviewed plaintiff's custody level. The board did not, however, consider whether plaintiff was entitled to his request to be released from his administrative segregation pursuant to LRAA § 201.7.

Plaintiff went to D.C. General Hospital on June 21, 1993. When he returned, he was placed in protective custody. At his October 12, 1993 hearing plaintiff and the Housing Board determined that he should be released from administrative segregation and returned to the general population.

II. Analysis

Plaintiff has brought suit against the District of Columbia and John Lattimore, Administrator of Lorton under 42 U.S.C. § 1983. He alleges that defendants violated his rights under the Fourteenth Amendment by holding him in involuntary protective custody after he had requested to be released from voluntary protective custody without making a determination that he was either an escape risk, a threat to others or faced a threat from others.[5] Plaintiff also brings pendent state claims alleging that the two defendants are jointly and severally liable under the LRAA for holding him in administrative segregation

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[5] Plaintiff had requested on December 1, 1992 to be released from protective custody. He alleges that he was improperly held until June 21, 1993.

without making the necessary findings and for failing to provide both an initial hearing and periodic housing reviews.

II A.

Defendants, relying on Graham v. Broglin, 922 F.2d 379 (7th Cir. 1991), initially argue that plaintiff's suit for damages under Section 1983 should be dismissed because the proper remedy is through a habeas corpus petition. Defendants are mistaken. The Supreme Court recently clarified the boundaries between claims properly brought under § 1983 and those that must be brought in a petition for habeas corpus. See Heck v. Humphrey, 114 S. Ct. 2364, 2369-72 (1994). The Heck Court held

> [W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed.

114 S.Ct. at 2372-73 (emphasis in original; footnotes omitted). Plaintiff is not challenging the validity of his sentence or any part of it. He is instead seeking damages for remaining in administrative segregation because of an alleged due process violation. Because "a judgment in favor of the plaintiff would [not] necessarily imply the invalidity of his

conviction or sentence," his claim is properly brought under § 1983. See id.

II. B. Fourteenth Amendment Liberty Interests

Fourteenth Amendment liberty interests may come from the Due Process Clause itself or from state law. See Hewitt v. Helms, 459 U.S. 460, 466 (1983). No liberty interest in placement and release from administrative segregation arises directly from the Constitution. Cf. id. at 467 ("[O]ur decisions have consistently refused to recognize more than the most basic liberty interests in arising directly from the Constitution); see also Bailey v. Shillinger, 828 F.2d 651, 652 (10th Cir. 1987) ("Classification of the plaintiff into administrative segregation does not involve deprivation of a liberty interest independently protected by the Due Process Clause.")

The question then is whether the LRAA creates such a Constitutionally protected interest. The Supreme Court set forth the general test for determining whether state law or regulations create a liberty interest in Hewitt and Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454 (1989). First, the regulations must contain "explicitly mandatory language." Thompson, 490 U.S. at 463. Specific procedural guidelines do not in and of themselves create a liberty interest even if the state law makes those procedures mandatory. Hewitt, 459 U.S. at 471. The state law must both establish mandatory procedures and also forbid a certain outcome (e.g. transfer to administrative segregation) absent certain specified substantive predicates being met. Id. In other words, unless the state requires that a prisoner cannot be placed in administrative segregation without a finding that the prisoner meets specified substantive predicates, state law does not create a liberty interest in being released from administrative segregation. See, e.g., Slezak v. Evatt, 21 F.2d 590, 594-95

(4th Cir.), cert denied, 115 S.Ct. 235 (1994). Finally, even if the state law sets forth specified substantive predicates that must be met, "if . . . the primary decisionmaker or any reviewing authority is authorized to override, as a matter of discretion, any classification suggested by application of the prescribed substantive criteria," state law creates no liberty interest. Id. at 595 (emphasis added, citations omitted).

The LRAA makes certain procedures mandatory before a prisoner who requests release from voluntary administrative segregation may be held involuntarily. LRAA § 201.7 provides:

> If a resident in voluntary protective custody provides the Department with a written statement that the resident no longer wishes to remain in protective custody, the resident shall be released at once from protective custody; Provided, that a resident who requests such a release may be placed in involuntary protective custody under the provision of this chapter for such involuntary placement.

(emphasis added). LRAA § 201.2 states that "[n]o resident may be held in administrative segregation for more than three (3) days without a hearing except as specifically provided in this chapter." As with the regulations cited in Hewitt, the LRAA establishes certain mandatory procedures. Looking at LRAA § 201.2 and § 201.7 together, it is clear that a prisoner who requests release from voluntary protective custody may not be held in involuntary protective custody for more than three days without receiving a hearing.

The LRAA also establishes certain specified substantive predicates that must be met before a resident be held involuntarily in administrative segregation. A resident may

not be placed involuntarily in administrative segregation unless he is found to be a "clear and present danger to the safety of others," or a "definite escape risk," or if the resident is "found to be in danger from a clear and present threat to the resident's safety," LRAA §§ 200.2, 200.3 and 200.4. The Court finds that these are in and of themselves specific substantive predicates. They are just as specific as those the Supreme Court considered in Hewitt. 459 U.S. at 471 n.6 ("[T]he need for control" and the threat of a serious disturbance" found to be specific substantive predicates.) In addition, LRAA § 202.4 further specifies how to determine if a resident is a "clear and present danger to others," or "is in danger from a clear and present threat from others." LRAA § 202.5 sets forth certain specific means by which a resident may be found to be an escape risk (e.g. "The resident possessed instruments designed for use in an escape.")

Defendants, relying on Abbott v. McCotter, 13 F.3d 1439 (10th Cir. 1994), argue that because LRAA § 202.5 also allows the housing board to consider "other relevant evidence reasonably showing the resident to be an escape risk," the substantive predicate is not definite enough to create a liberty interest. The Court disagrees. The regultions in Abbott are very different from the LRAA. In Abbott, one of the five predicates for placing a prisoner in administrative segregation is "when circumstances make it necessary." The inclusion of this "catch-all" predicate allows prison officials broad discretion. The LRAA lists three specific predicates and reserves no general authority as in Abbott. The LRAA does give the housing board some discretion in how it determines whether the resident is an escape risk. But the housing board must still determine that the defendant is an escape risk, which is a specific predicate.

Defendants rely on cases from other Circuits, which have held that prison regulations do not establish a protected

liberty interest. The regulations in those cases, however, are quite different from the LRAA. In Pardo v. Hosier, 946 F.2d 1278 (7th Cir. 1991) the prison regulations established mandatory procedures, but did not set forth specific substantive predicates. The regulations simply state that "incidents occur which, in the interest of institutional security and safety, require that a resident be . . . placed in a holding unit." Id. at 1281. Unlike the LRAA, there are no specified substantive predicates that restrict officials' discretion. The regulations in Kulow v. Nix, 28 F.3d 855 (8th Cir. 1994) bear no resemblance to the LRAA regulations on administrative segregation. In that case, the prison committee could determine that a prisoner be held in involuntary protective custody for their own protection "for any valid reason." Id. at 858. The LRAA has no provision that gives the housing board such broad discretion.

Finally, defendants argue that the Court should rely on the reasoning in Slezak v. Evatt, supra. In Slezak, the Court found that there was no liberty interest created by the prison regulations. Although the regulations contained both substantive predicates and mandatory language, the regulations also called for additional levels of review after the housing board made its recommendation.

Defendants claim that the LRAA is akin to the regulations in Slezak because the warden may in his or her discretion, override the Housing Board's decision. Defendants rely on a housing board form that contains notation for a "discretionary override." No provision in the LRAA calls for any such discretionary override or discretionary review of the housing board's decision. If officials at Lorton are using this "override" procedure, it is not called for by state law. The exercise of discretion not called for by state law does not support defendants' argument that the LRAA does not create a liberty interest in release from administrative segregation.

It is true that prisoners may appeal the decision of the housing board to the Administrator. LRAA § 209.1 No provision in the LRAA would support the claim that this additional level of review increases official discretion. The regulations are clear that absent certain substantive predicates a prisoner may not be placed in administrative segregation. Because the LRAA does not indicate otherwise, this Court must assume that Administrator is as constrained on appeal by the specified predicates as the housing board is. See Byrd v. District of Columbia, 92cv608, p. 13 n.6 (D.D.C., Sept. 24, 1993 unpublished memorandum opinion, Lamberth, J.)

The LRAA contains mandatory language and establishes specific substantive predicates. Prisoners who do not meet those substantive predicates are not to be placed in administrative segregation. The Court therefore concludes that plaintiff has identified a Constitutionally protected liberty interest in being placed in and released from administrative segregation.[6]

II. C. Municipal Liability Under Section 1983

Plaintiff has included the District of Columbia as a defendant.[7] The District may be held liable for money

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[6] The Court need not reach the issue of what procedures plaintiff was entitled to. In this case, it is undisputed that he received no procedural protections at all.

[7] It is not clear from the complaint whether plaintiff is also suing defendant Lattimore in his official capacity. The Court will assume that he is. Such a suit is to be treated as a suit against the District of Columbia. See Kentucky v. Graham, 473 U.S. 159, 166 (1985).

damages under § 1983 if "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted by [the District]'s officers." Monell v. Department of Social Services, 436 U.S. 658, 690 (1978). In other words, the District may not be held liable simply on a respondeat superior basis for the actions of its non-policymaking officials. The municipality must be a "moving force" behind the violation. Kentucky v. Graham, 473 U.S. 159, 166 (1985) (citations omitted).

There are a number of ways that the plaintiff could show that the District is responsible under § 1983 for the actions of defendant Lattimore. The LRAA appears to set forth the official written policy of the District governing the holding of prisoners in involuntary protective custody. If, however, Administrator Lattimore "possesse[d] final authority to establish municipal policy with respect to the action ordered," the District would be liable for his knowing decision to hold plaintiff in administrative segregation without determining whether the plaintiff met the LRAA substantive predicates. See Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986).

Second, if plaintiff showed that there was a widespread and longstanding practice at Lorton to hold prisoners in administrative segregation without making the findings required by the LRAA, that could establish that the practice was authorized by policymaking officials even though the practice was not set forth in a written law or policy. See City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988).

The decision as to whether an official has final policymaking authority is a matter of state law. See Jett v. Dallas Independent School Dist., 491 U.S. 701, 737 (1989). Neither party has addressed whether or not the Lorton Administrator has such authority. However, the LRAA is District of Columbia law, and it explicitly addresses the

placement of prisoners in administrative segregation. Because the plaintiff has submitted no evidence to the contrary, the Court finds that the District Council not the Lorton Administrator, is the final policymaking authority in this area.

The Court can grant neither the plaintiff's nor the District of Columbia's motions for summary judgment on § 1983 liability because there remain issues of material fact as to whether there was a practice or policy at Lorton so permanent and well settled as to constitute a 'custom or usage' with the force of law." Prapotnik, 485 U.S. at 127 (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970).

Pursuant to the Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Mere allegations or denials of the moving party's pleadings are not enough to prevent issuance of summary judgment. The adverse party's response to the summary judgment motion must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Pro. 56(e). In this case, neither party has set forth facts sufficient to allow the Court to grant its motion for summary judgment.

Plaintiff has referred to Judge Lamberth's opinion in Byrd, which cites the written statement of a previous Administrator at Lorton:

> [T]he general policy of this facility is that a resident who is transferred to the Maximum Security Facility because of a disciplinary report, will not be considered for less restrictive housing for at least six months.

Byrd, supra at 5 (quoting October 28, 1991 letter from Lorton Administrator Stemson). In addition, plaintiff has submitted a declaration and attached exhibits showing that defendants repeatedly ignored his written and verbal requests to be released from administrative segregation. It may be that the "policy" announced by Administrator Stemson has been adopted by Administrator Lattimore. Plaintiff's declaration and exhibits might be evidence that this "policy" was still in effect from December, 1992 to June, 1993. Furthermore, the fact that two different Administrators adopted the same policy might tend to show that this was policy authorized by the District rather than its being a departure from District policy by subordinate officials.

But plaintiff has not submitted any evidence, sufficient as a matter of law, to show that the policy stated by Administrator Stemson in October, 1991, was in effect from December 1992 to June 1993.[8] The Court cannot conclude that plaintiff's evidence of defendants' repeated failures to hold a housing hearing in 1992-93 to determine if plaintiff met the substantive predicates for administrative segregation set forth in the LRAA constitutes a "custom or usage with the force of law." Prapotnik, 485 U.S. at 127. Because the LRAA requires such findings before prisoners can be held involuntarily, there is conflicting evidence as to whether Lattimore's actions represented official policy.

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[8] For example, Plaintiff has not submitted evidence showing that other prisoners recently moved to the Maximum Security Facility were held in administrative segregation without findings that they were a threat to others, an escape risk, or faced a serious threat from others.

The Court also cannot grant the District of Columbia's motion for summary judgment. DC has submitted no evidence contradicting plaintiff's evidence that he was for months denied his right to be released from administrative segregation without a finding that he met the criteria for continued confinement. It has submitted no evidence showing that Administrator Stemson's October 1991 letter did not constitute official policy. Nor has it submitted evidence sufficient to show that the policy was not still in effect from December 1992 to June 1993. Discovery on these questions may well be necessary. The Court cannot decide them without further submission of evidence by the parties.

II. D. Harmless Error Analysis

Defendant DC claims that even if plaintiff's rights were violated by failing to provide him with a hearing and failing to make the determination that he was an escape risk or threat to self and others, the error was harmless.[9] That claim is not supported by the evidence. Defendants state that prison officials found defendant to be an escape risk at a custody review on March 24, 1993. In fact, at the March 24, 1993 review, plaintiff's escape history score was zero, and the

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[9] The cases defendant cites to support its claim that this Court should use harmless error analysis all concern Court findings that an error in procedure occurred at a hearing. In this case, plaintiff is challenging the fact that no hearing was held for about seven months to determine if he could legally be held in administrative segregation. It is unclear whether harmless error analysis is appropriate where no hearing occurred at all. Plaintiffs have not raised this issue. Because the Court finds the error was not harmless, it need not consider whether the defendants' violations of plaintiff's Constitutional rights ought to be subject to harmless error analysis.

prison officials recommended that Mr. Neal be placed in medium custody.[10] Nothing in that review supports the argument that defendants would have found Mr. Neal to be an escape risk subject to continued administrative segregation in December, 1992 had a hearing been held. Defendants also rely on the July 8, 1993 housing board finding that Mr. Neal was a "threat to self and others" to prove harmless error. Defendant Roach's Motion to Dismiss, Ex. 5, p. 2. This housing board finding does not demonstrate that the failure to hold hearings from December 1992 on was harmless. The Board made its July 8, 1993 finding because Mr. Neal had been stabbed by another inmate on or about June 21, 1993 while he was in Cellblock 1 in protective custody. Defendant Roach's Motion to Dismiss, Ex. 5, p. 1-2. The June 21, 1993 incident is irrelevant to defendant's claim that the Housing Board would have concluded in December 1992 that Mr. Neal should remain in protective custody.

For the reasons set forth in part II C, plaintiff's motion for summary judgment is denied. For the reasons set forth in part II D & E, defendant's motion for summary judgment is denied.

III Pendent State Claims

Plaintiff has set forth two state causes of action under the LRAA. First, he alleges that defendants Lattimore and the District are jointly and severally liable for holding him in involuntary protective custody from December 1, 1992 to June 21, 1993 without making the appropriate findings

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[10] Plaintiff has submitted a declaration stating that the March 24, 1993 hearing only concerned his custody status, not his placement in administrative segregation. Defendants have submitted no contradictory evidence.

required by the LRAA.[11] Second, plaintiff alleges that defendants Lattimore and the District are jointly and severally liable under LRAA § 207 for holding him in involuntary protective custody from April 30, 1992 (the date Neal was supposed to receive his first periodic housing review after his initial placement in administrative segregation) to June 21, 1993 without holding periodic housing hearings.

Neither party has adequately briefed the state law questions. It is not clear whether the LRAA even creates a private right of action. Even if the LRAA does create a private right of action, the parties have not addressed whether plaintiff must exhaust any administrative procedures before bringing a claim under the LRAA. Until the parties address these questions, the Court cannot determine whether Mr. Neal has a state law cause of action and, if so, whether this Court will exercise supplemental jurisdiction under 28 U.S.C. § 1367. Accordingly, the Court will order that the parties submit simultaneous memoranda of points and authorities on these questions within ten days.

IV Defendant Lattimore's Motion to Dismiss

Defendant Lattimore has made a motion to dismiss the § 1983 claims against him on the grounds that he is protected by qualified immunity. He also argues that plaintiff's state law claims are properly brought in state court. The Court cannot grant the motion to dismiss at this time. As explained above,

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[11] Plaintiff specifically alleges violations of LRAA §§ 200.4, 201.7 see supra and 206.1 ("If, after a hearing, the Board determines that the resident should be placed in segregation the Board must prepare within three (3) working days of the hearing, a written statement containing the Board's decision and the factual information upon which the decision is based.")

the Court may still exercise supplemental jurisdiction over plaintiff's state law claims. Qualified immunity does not protect defendant Lattimore against those claims. Plaintiff has alleged that defendant Lattimore not only was personally aware of plaintiff's repeated requests to be released from administrative segregation, but also that he callously disregarded plaintiff's rights. The defendant certainly must explain why he ignored the LRAA and the regular attempts by the plaintiff to obtain a hearing and release form administrative segregation. Until then, the Court will deny the motion to dismiss. An appropriate order follows.

DATE: 6/12/95

/s/
Stanley Sporkin
United States District Court

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
JUN 12, 1995
Clerk U.S. District Court
District of Columbia

JAMES NEAL	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 94-1528
DISTRICT OF COLUMBIA, et al.	)	(Stanley Sporkin)
	)	
	)	
Defendants.	)	

ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant District of Columbia's motion for summary judgment be **DENIED**. It is further

ORDERED that plaintiff's motion for summary judgment be **DENIED**. It is further

ORDERED that all parties submit memoranda of points and authorities within ten days of the receipt of this order on the question of whether the LRAA creates a private right of action; if so, whether plaintiff must first exhaust

administrative remedies; and if so, whether he has done so. It is further

ORDERED that defendant Lattimore's motion to dismiss plaintiff's claims against him personally under 42 U.S.C. § 1983 be **DENIED**. It is further

ORDERED that defendant Lattimore's motion to dismiss plaintiff's supplemental claims under the LRAA be **DENIED**.

DATE: 6/12/95

/s/ Stanley Sporkin
United States District Court

APPENDIX I

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-7187 **September Term, 1997**
94cv01528

UNITED STATES COURT OF
APPEALS FOR DISTRICT OF
COLUMBIA CIRCUIT FILED
FEB -9 1998
CLERK

James H. Neal,

Appellant

v.

District of Columbia and John Lattimore,
Appellees

BEFORE: Wald, Henderson and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed January 15, 1998, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Deputy Clerk

APPENDIX J

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-7187 **September Term, 1997**
94cv01528

UNITED STATES COURT OF
APPEALS FOR DISTRICT OF
COLUMBIA CIRCUIT FILED
FEB -9 1998
CLERK

James H. Neal,

Appellant

v.

District of Columbia and John Lattimore,
Appellees

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant's Suggestion for Rehearing In Banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Deputy Clerk

APPENDIX K

Constitutional provisions

U.S. Const. amend V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Regulations

D.C. Mun. Regs. tit. 28 (1987)
(Lorton Regulations Approval Act ("LRAA")(1982))

D.C. Mun. Regs. tit. 28 § 500.1 (1987)

The provisions of §§500 through 519 of this chapter shall govern disciplinary actions taken when a resident of a District correctional facility is charged with a violation of the Code of Offenses set forth in §§502 through 504 of this chapter. (LRAA Ch. 1 § 100.1 (1982))

D.C. Mun. Regs. tit. 28 § 500.2 (1987)

A resident charged with a violation of the Code of Offenses who is found to pose a clear and present danger to others, or who is a definite escape risk, may be placed in administrative segregation prior to a hearing pursuant to the provisions of §531 of this chapter. (LRAA Ch. 1 § 100.2 (1982))

D.C. Mun. Regs. tit. 28 § 500.3 (1987)

A resident charged with a violation of the Code of Offenses who is found to be in danger from a clear and present threat to that resident's safety may be placed in involuntary protective custody pursuant to the provisions of §521 of this chapter. (LRAA Ch. 1 § 100.3 (1982))

D.C. Mun. Regs. tit. 28 § 500.4 (1987)

A resident who has been charged with a violation of the Code of Offenses may request placement in voluntary protective custody pursuant to the provisions of §521 of this chapter. (LRAA Ch. 1 § 100.4 (1982))

D.C. Mun. Regs. tit. 28 § 500.5 (1987)

If an alleged violation of the Code of Offenses is referred for prosecution, both adjustment action and housing action may be taken against the resident charged with the violation. (LRAA Ch. 1 § 100.5 (1982))

D.C. Mun. Regs. tit. 28 § 500.6 (1987)

If both adjustment and housing actions are initiated against a resident for the same alleged violation of the Code of Offenses, the adjustment and housing hearings required by this chapter shall be consolidated to allow the resident to be represented by one (1) counsel at both hearings. (LRAA Ch. 1 § 100.6 (1982))

D.C. Mun. Regs. tit. 28 § 500.7 (1987)

Notwithstanding the requirements of this chapter, a resident who has been found to have committed a Class III (minor) offense by a Department employee may be subject to any of the following actions without a hearing or written record:
(a) Reprimand and warning;
(b) Restitution, where appropriate; and
(c) Confiscation, where appropriate.
(LRAA Ch. 1 § 100.7 (1982))

D.C. Mun. Regs. tit. 28 § 500.8 (1987)

Whenever an offense is charged, the accused shall be accorded all of the procedural safeguards provided in this chapter. (LRAA Ch. 1 § 100.8 (1982))

D.C. Mun. Regs. tit. 28 § 505.2 (1987)

A resident who is found guilty of a violation of any Class II (major) offense, as set forth in §503, shall be subject to the imposition of any of the following penalties and to any penalty set forth in §505.3 for Class III (minor) offenses:
(a) Forfeiture of all or part of earned good time;
(b) Change in custody status or housing assignment;
(c) Assignment to adjustment segregation, as defined in §505.5, for a period not to exceed
fourteen (14) days;
(d) Loss of pay, reduction in grade, or change of work assignment; Provided, that this punishment shall only be imposed when the offense was committed in the performance of a work assignment;
(e) Transfer to Maximum Security status; or
(f) Extra duty assignment to be performed in the resident's off-duty time from the resident's regular work assignment. (LRAA Ch. 1 § 105.2 (1982))

D.C. Mun. Regs. tit. 28 § 520.2 (1987)

A resident who has been found to pose a clear and present danger to the safety of others shall be subject to placement in administrative segregation. (LRAA Ch. 2 § 200.2 (1982))

D.C. Mun. Regs. tit. 28 § 520.3 (1987)

A resident who is found to be a definite escape risk shall be subject to administrative segregation. (LRAA Ch. 2 § 200.3 (1982))

D.C. Mun. Regs. tit. 28 § 520.4 (1987)

A resident who is found to be in danger from a clear and present threat to the resident's safety shall be subject to

placement in involuntary protective custody. (LRAA Ch. 2 § 200.4 (1982))

D.C. Mun. Regs. tit. 28 § 521.2 (1987)

Administrative segregation may be used for the following purposes:
(a) To hold a resident prior to a housing hearing or adjustment hearing; or
(b) To hold a resident in voluntary or involuntary protective custody. (LRAA Ch. 2 § 201.1 (1982))

D.C. Mun. Regs. tit. 28 § 521.3 (1987)

Administrative segregation shall also include restrictive confinement of a prisoner in any cell of the maximum security facility, or in a control cell of the central facility, or in a control cell at Youth Center II, or in the protective custody unit of Youth Center I, or in the adjustment unit of Youth Center I. (LRAA Ch. 2 § 201.8 (1982))

D.C. Mun. Regs. tit. 28 § 521.4 (1987)

Before a resident is placed in any cell of the maximum security facility, or in a control cell of the central facility, or a control center at Youth Center II, there shall be a finding made that:
(a) There is a clear and present threat to the safety of the resident;
(b) The resident poses a clear and present threat to the safety of others; or
(c) The resident poses a definite escape risk.
(LRAA Ch. 2 § 201.9 (1982))

D.C. Mun. Regs. tit. 28 § 521.10 (1987)

Involuntary protective custody shall be defined as confinement of a resident in administrative segregation against the resident's will. (LRAA Ch. 2 § 201.5 (1982))

D.C. Mun. Regs. tit. 28 § 521.11 (1987)

Voluntary protective custody shall be defined as the placement of a resident in administrative segregation at the request of the resident. (LRAA Ch. 2 § 201.6 (1982))

D.C. Mun. Regs. tit. 28 § 521.12 (1987)

If a resident in voluntary protective custody provides the Department with a written statement that the resident no longer wishes to remain in protective custody, the resident shall be released at once from protective custody; Provided, that a resident who requests release may be placed in involuntary protective custody under the provisions of this chapter for involuntary placement in protective custody. (LRAA Ch. 2 § 201.7 (1982))

D.C. Mun. Regs. tit. 28 § 526.1 (1987)

If, after a hearing, the Board determines that the resident should be placed in segregation, the Board shall prepare, within three (3) working days of the hearing, a written statement containing the Board's decision and the factual information upon which the decision is based. (LRAA Ch. 2 § 206.1 (1982))

D.C. Mun. Regs. tit. 28 § 527.1 (1987)

If a resident is placed in administrative segregation, that placement shall be reviewed at hearings held at thirty (30) day intervals. (LRAA Ch. 2 § 207.1 (1982))

D.C. Mun. Regs. tit. 28 § 527.2 (1987)

At each thirty-day review, it shall be the responsibility of the Board to determine whether the resident's return to the general population at the time of that particular review still poses an escape risk or security risk to the resident or others. (LRAA Ch. 2 § 207.2 (1982))

D.C. Mun. Regs. tit. 28 § 527.3 (1987)

In particular under §527.2, the Board members shall determine whether other residents from whom the resident is to be separated are presently in the general population. (LRAA Ch. 2 § 207.2 (1982))

D.C. Mun. Regs. tit. 28 § 527.4 (1987)

The resident shall have a right to be present, with a representative, at every third (3rd) review hearing (every ninety (90) days). The resident may present evidence at that time. (LRAA Ch. 2 § 207.3 (1982))

D.C. Mun. Regs. tit. 28 § 527.5 (1987)

At each thirty-day review hearing, the resident or the resident's counsel or substitute counsel may present in writing any new evidence for the consideration of the Board. (LRAA Ch. 2 § 207.4 (1982))

D.C. Mun. Regs. tit. 28 § 527.6 (1987)

If after a thirty-day review hearing the Board determines that the resident should remain in segregation, it shall prepare a written statement of the reasons for its determination. (LRAA Ch. 2 § 207.5 (1982))

D.C. Mun. Regs. tit. 28 § 527.7 (1987)

A copy of this written statement shall be furnished to the resident within one (1) week of the determination. (LRAA Ch. 2 § 207.6 (1982))

D.C. Mun. Regs. tit. 28 § 527.8 (1987)

If the Board determines that there is no longer an escape risk, or a security risk to the resident or others, the resident shall be released from segregation. (LRAA Ch. 2 § 207.7 (1982))

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

James H. Neal, #184-107
P.O. Box 5200
Lorton, Virginia 22199-0902
(Enter above, full name, prison number and address)

vs.

CIVIL ACTION NO._____
(To be supplied by the Clerk of the District Court)

District of Columbia
District Building
350 Pennsylvania Avenue, NW
Washington, DC 20004

David Roach
Warden
Maximum Security Facility
P.O. Box 5200
Lorton, Virginia 22199-0902
(Enter above, full name and address, of defendant(s) in this action)

COMPLAINT FOR VIOLATION OF CIVIL RIGHTS

Instructions for filing a Complaint by a Prisoner
Under the Civil Rights Act, 42 U.S.C. Section 1983

This packet contains one copy of a complaint form and one copy of a forma pauperis petition. To start an action, you must file an original and one copy for the Court and one copy

for each defendant you name. For example, if you name two defendants, you must file the original and three copies of the complaint. You should also keep an additional copy of the complaint for your own records. All copies of the complaint must be identical to the original.

The Clerk will not file your complaint if these instructions and these forms are not used.

Your complaint must be clearly handwritten or typewritten. You, the plaintiff, must sign and declare under penalty of perjury that the facts are correct. If you need additional space to answer a question, you may use another blank page.

Your complaint can be brought in this Court only if one or more of the named defendants is located within the District of Columbia. Further, you must file a separate complaint for each claim that you have unless they are all related to the same incident or problem.

In order for this complaint to be filed, it must be accompanied by the filing fee of $120.00. In addition, you must serve a copy of the complaint on each of the defendants in any of the ways provided for in Rule 4, Federal Rules of Civil Procedure.

If you are unable to pay the filing fee and service costs for this action, you may petition the Court to proceed in forma pauperis. One blank petition for this purpose is included in this packet. This petition should be filed with your complaint.

The law requires that you state only facts in your complaint. COMPLAINTS CONTAINING LEGAL ARGUMENTS OR CITATIONS WILL NOT BE FILED.

When these forms are completed, mail the original and the required copies to the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue, N.W. , Room 1825, Washington, D.C. 20001.

I. PREVIOUS LAWSUITS

A. Have you begun other lawsuits in state or federal Court dealing with the same or similar facts involved in this action? Yes (*XXX*) No ( )

B. Have you begun other lawsuits in state or federal court relating to your imprisonment? Yes ( ) No (*XXX*)

C. If your answer to A or B is Yes, describe each lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit

Plaintiffs: *James H. Neal*

Defendants: *District of Columbia, et al.*

2. Court (if federal court, name the district; if state court, name the county): *U. S. District Court for the District of Columbia.*

3. Docket number: *93-2443*

4. Name the judge to whom case was assigned: *J. Sporkin (SS)*

5. Disposition (for example: was the case dismissed? Was it appealed? Is it still pending?): *It's still pending*

6. Approximate date of filing lawsuit? *November 1, 1993*

7. Approximate date of disposition: *Still pending*

II. PLACE OF PRESENT CONFINEMENT: *Maximum Security Facility, Lorton, Virginia*

A. Is there a prisoner grievance procedure in this institution? Yes (*XXX*) No ( )

If your answer is Yes, go to Question II B. If your answer is No skip Question II B, C and D and go to Question II E.

B. Did you present the facts relating to your complaint in the prisoner grievance procedure? Yes (*XXX*) No ( )

C. If your answer is Yes to Question II B

1. To whom and when did you complain? *The Administrator*

2. Did you complain in writing? (Furnish copy of the complaint you made, if you have one.) *Yes*

3. What, if any response, did you receive? (Furnish copy of response if in writing.) *No response received - see copy of complaint*

4. What happened as a result of your complaint? *Nothing*

D. If your answer is No to Question II B, explain why not. *See enclosed complaint*

E. If there is no prison grievance procedure in the institution, did you complaint to prison authorities? Yes (*XXX*) No ( )

F. If your answer is Yes to Question II E

1. To whom and when did you complain? *To the Administrator on April 11, 1993.*

2. Did you complain in writing? (Furnish copy of the complaint you made, if you have one.) *Yes*

3. What, if any response, did you receive? (Furnish copy of response if in writing.) *Never received a response.*

4. What happened as a result of your complaint? *Nothing*

III. PARTIES

In item A below, place your name and prison number in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.

A. Name of plaintiff: *James H. Neal # 184-107*
Address: *P.O. Box 5200, Lorton, Virginia 22199*

In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and address in the third blank.

B. Defendant: *David D. Roach*
Official position: *Warden*
Address: *P.O. Box 5200, Lorton, Virginia 22199-0902*

Defendant: *District of Columbia District Building*
Official position:
Address: *1350 Pennsylvania Avenue, NW*
Washington, D.C. 20004

You may list any additional defendants on a blank sheet of paper.

IV. STATEMENT OF CLAIM

State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statues. If you intent to allege a number of related claims, number and set forth each claim in a separate paragraph. Attach extra sheet, if necessary.

From approximately April 3, 1992 to June 21, 1993 I was housed in CB-1 at Lorton's Maximum Security Facility. At no time did I receive a housing review held at 30 day intervals, nor did I receive a review hearing every 90 days as provided by the "Lorton Regulation Approval Act of 1982".

V. RELIEF

State briefly exactly what you want the Court to do for you. Make no legal arguments. Cite no cases or statutes.

1. Compensatory damages from defendants in an amount not less than $100,000 each.
2. Punitive damages from defendants in an amount not less than $100,000 each.
3. Appointment of counsel.
4. Any other just and appropriate relief - trial by jury.

Signed this 22 day of June, 1994.

/s/ James H. Neal
(Signature of plaintiff)

I declare under penalty of perjury that the foregoing is true and correct.

6/22/94 /s/ *James H. Neal*
(date) (Signature of plaintiff)

/s/ *M. L. Williams*
My Commission Expires 9/30/94

APPENDIX M

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

James H. Neal,	:	
Plaintiff,	:	
vs.	:	Civil Action No. 94-1528 Judge Stanley Sporkin
District of Columbia, et. al.	:	
Defendants.	:	

AMENDED COMPLAINT

1. Plaintiff was originally placed on voluntary protective custody status and housed in cellblock one (1) on March 31, 1992.

2. In compliance with the Lorton Regulations Approval Act of 1982, Section 207.2 the plaintiff should have been reviewed at thirty-day hearings which he did not received.

3. Further in compliance with the Lorton Regulations Approval Act of 1982, Section 207.3 plaintiff had a right to a review hearing every ninety (90) days which he did not receive.

4. On several occasions the plaintiff has filed request to be released from protective custody status (see attached copies).

5. The Lorton Regulations Approval Act of 1982, Section 200.4 creates a liberty interest not to be confined in P/C without either the consent of the resident or a finding that the resident is in "danger from a clear and present threat of the resident's safety."

6. Plaintiff was retained on P/C despite having served notice of withdrawal of his consent, and without any finding or hearing as whether the plaintiff faced danger warranting involuntary P/C.

7. Plaintiff claim is a denial of Fifth Amendment procedural due process (no procedure at all having been used to determine the validity of his continued detention in P/C) for which the plaintiff seeks damages for loss of liberty, and mental and emotional distress.

RELIEF

WHEREFORE Plaintiff seeks the following damages for loss of liberty, and mental and emotional distress:

1. Compensatory damages from defendants in an amount not less than One Hundred Thousand Dollars ($100,000.00) each; and

2. Punitive damages from the defendants in an amount not less than One Hundred Thosand Dollars ($100,000.00) each; and

3. Appointment of Counsel; and

4. Any other just and appropriate relief deemed by the Court - trial by jury.

Respectfully submitted,

/s/ James H. Neal
DCDC #184-107
Maximum Security Facility
P.O. Box 5200
Lorton, VA 22199

APPENDIX N

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES H. NEAL,	)	
Plaintiff,	)	
v.	)	Civ. A. No.
	)	94-1528-SS
DISTRICT OF COLUMBIA, *et al.*,	)	
Defendants.	)	

STATEMENT OF MATERIAL FACTS NOT SUBJECT TO GENUINE DISPUTE

1. Plaintiff James H. Neal is a District of Columbia prisoner. He is presently housed in the general population cell block, Cell Block Seven, at the Maximum Security Facility at Lorton, Virginia. Plaintiff's Exhibit A at ¶ 1.

2. Around March 1, 1992, Mr. Neal was transferred from the Federal Bureau of Prisons (Leavenworth) to the District of Columbia Department of Corrections, Occoquan Facility, Lorton, Virginia. Department officials informed Mr. Neal that, due to the length of his sentence, he would have to be housed at the Maximum Security Facility. Mr. Neal acknowledged their view and did not oppose being housed at the Maximum Security Facility. Defendant's Exhibit #3, at 4.

3. Around March 22, 1992, Mr. Neal arrived at the Maximum Security Facility. On March 31, 1992, Mr. Neal received his initial classification hearing. Only one member of the Classification Board, Case Manager Jefferey Durante, was present. Mr. Neal requested voluntary protective custody status, because he wanted to become acquainted with the conditions and routine at the Maximum Security Facility before being exposed to the general population there. Mr. Neal did not request protective custody because of any specific threat to his safety. Mr. Neal did not know of, nor did he believe there was, any such threat. Plaintiff's Exhibit A. The housing committee placed Mr. Neal in Cell Block #1 (CB#1) because of his request for protective custody and because

> [i]t is the policy of the Maximum Security Facility to house those residents in Cellblock #1 requiring protective custody and who have been determined by the Housing Board or Classification Committee as possessing a non-violent institutional case history.

Division Operations Procedure 4000.1, Cellblock One Operations, cited in Motion of Defendant, David Roach, to Dismiss Plaintiff's Complaint, or in the Alternative, for Summary Judgment (defendant Roach's Motion), at 6, fn. 2.

4. During the Classification Board hearing on March 31, 1992, Mr. Neal signed a Notice of Housing Hearing scheduling a rehearing date at April 30, 1992. Defendant's Exhibit #3, at 2.

5. At the Classification Board hearing on March 31, 1992, Mr. Neal requested a copy of the Classification Board memorandum recording the Classification Board hearing, as well as a copy of the Notice of Housing Hearing. Case

Manager Durante stated that Mr. Neal would receive copies of these documents. Mr. Neal received the memorandum about four to five days after the hearing from a detail man who received the memorandum from the Officer in Charge (OIC). The memorandum set Mr. Neal's rehearing date for April 30, 1992. Defendant's Exhibit #3, at 1. Mr. Neal never received a copy of the Notice. Plaintiff's Exhibit A at ¶ 5.

6. Inmates at CB#1 are confined to their cells for long periods, and are allowed only limited time for indoor activity out of their cells, and even less time out of doors. Outdoor activity is limited to a small, enclosed concrete courtyard. Inmates are not allowed to visit the law library or to engage in gainful employment of any kind. Inmates have access to the infirmary only on recommendation of the doctor conducting rounds in the cellblock. Plaintiff's Exhibit A at ¶ 6.

7. Within one month of being housed in CB#1, Mr. Neal wished to leave due to the restrictive conditions of confinement in CB#1. Mr. Neal no longer desired protective custody and wanted to be housed in the general population of the Maximum Security Facility. Plaintiff's Exhibit A at ¶ 7.

8. Residents in the general population are allowed greater amounts of time out of their cells for indoor and outdoor activities. The space outdoors includes a large courtyard, many times larger than the courtyard used by CB#1 prisoners, and a grass field. Upon request, passes are freely granted for access to the law library, the post office, the gymnasium, and sick call at the infirmary. There is opportunity for gainful employment, such as work in the law library, which Mr. Neal now does. Plaintiff's Exhibit at ¶ 8.

9. Mr. Neal did not receive a review of his housing status on April 30, 1992, as had been scheduled. According to the Lorton Regulations Approval Act of 1982 (LRAA), the

housing status of inmates in administrative segregation must be reviewed at thirty day intervals. However, Mr. Neal did not receive a review of his housing status by the end of May 1992. Defendant's Exhibit #7, at 21 (LRAA § 207.1, at 29); Plaintiff's Exhibit A at ¶ 9.

10. According to the LRAA, inmates in administrative segregation have the right to attend a review hearing every ninety days. However, Mr. Neal did not receive a review of his housing status by the end of June 1992. Defendant's Exhibit #7, at 22 (LRAA § 207.3, at 30); Plaintiff's Exhibit A at ¶ 10.

11. Mr. Neal did not receive any review of his housing status by the end of July, August, or September 1992. Plaintiff's Exhibit A at ¶ 11.

12. On October 5, 1992, Mr. Neal submitted a Resident Request Slip to the Housing Board, requesting a 30 or 90 day review of his housing. Plaintiff's Exhibit 1. Mr. Neal submitted the Request Slip by requesting and obtaining copies of the form from a guard, filling out the Request Slip using carbon in order to retain a copy for his records, and then placing the Request Slip in the intra-facility and general mail-box, which is connected to the guards' side of the grille in CB#1. In submitting the Request Slip, Mr. Neal wanted the Housing Board to review his housing status so that Mr. Neal could request placement in the general population. Plaintiff's Exhibit A at ¶ 12.

13. The Housing Board did not respond to Mr. Neal's request of October 5, 1992. The Housing Board did not review Mr. Neal's housing status by the end of October, 1992. Plaintiff's Exhibit A at ¶ 13.

14. On November 7, 1992, Mr. Neal submitted a second Resident Request Slip to the Housing Board, requesting a review of his housing status. Plaintiff's Exhibit 2.

15. The Housing Board did not respond to Mr. Neal's request of November 7, 1992. The Housing Board did not review Mr. Neal's housing status by the end of November, 1992. Plaintiff's Exhibit A at ¶ 15.

16. On December 1, 1992, Mr. Neal submitted a third Resident Request Slip to the Housing Board, specifically asking for "placement in general population." Plaintiff's Exhibit 3.

17. The Housing Board did not respond to Mr. Neal's request of December 1, 1992. The Housing Board did not review Mr. Neal's housing status by the end of December, 1992. Plaintiff's Exhibit A at ¶ 17.

18. On January 5, 1993, Mr. Neal submitted a fourth Resident Request Slip to the Housing Board, requesting to be "released from segregation." Plaintiff's Exhibit 4.

19. The Housing Board did not respond to Mr. Neal's request of January 5, 1993. The Housing Board did not review Mr. Neal's housing status by the end of January, 1993. Plaintiff's Exhibit A at ¶ 19.

20. On February 6, 1993, Mr. Neal submitted a fifth Resident Request Slip to the Housing Board, requesting a housing hearing and a change of status from protective custody, so that he could be "released from segregation and placed in the general population." Plaintiff's Exhibit 5.

21. The Housing Board did not respond to Mr. Neal's request of February 6, 1993. The Housing Board did not

review Mr. Neal's housing status by the end of February, 1993. Plaintiff's Exhibit A at ¶ 21.

22. On March 24, 1993, the Classification Board reviewed Mr. Neal's custody level. The Classification Board found that Mr. Neal should remain at the Maximum Security Facility. The Classification Board did not address, and made no determination as to, Mr. Neal's entitlement to release from protective custody. Defendants' Exhibit #4, at 1-2.

23. On March 24, 1993, during the outside recreation period, Mr. Neal's Classification and Parole Officer, Ms. Hayes, presented Mr. Neal with a Protective Custody Request/Waiver Form. Mr. Neal was suspicious of Ms. Hayes' presentation of the form in the absence of a housing hearing, and refused to sign the form until he had communicated with his attorney and until a housing hearing was held. Mr. Neal communicated his objection to Ms. Hayes, and noted his objection on the Request/Waiver Form. Defendant's Exhibit #4, at 3; Plaintiff's Exhibit A at ¶ 23.

24. On March 29, 1993, Mr. Neal submitted a Resident Request Slip to Administrator John W. Lattimore, stating

> I've submitted several requests to the housing board, spoke with my C&P about being reviewed so I can be placed in general population and I've yet to get any results so I turn to you. I've been in administrati[ve] segregation P/C [protective custody] for a year now and I haven't had any 30 or 90 day reviews as provided by the LRAA of 1982 (None!). I simply want to be removed from CB-1 and placed in CB-7 general population. In order for this to occur I have to have a housing [review] so I can sign off of P/C

> (which I've been trying to do for sometime now) and be properly housed. Would you please instruct the board to give me a housing hearing as soon as possible.

Plaintiff's Exhibit 6.

25. Administrator Lattimore did not respond to Mr. Neal's request. The Housing Board did not review Mr. Neal's housing status. Plaintiff's Exhibit A at ¶ 25.

26. On March 30, 1993, on his way to sick-call, Mr. Neal encountered Administrator Lattimore, and told him he wanted to be placed in the general population. Administrator Lattimore told Mr. Neal to submit a written request. Mr. Neal said that he already had submitted a written request. Plaintiff's Exhibit A at ¶ 26.

27. On April 11, 1993, Mr. Neal submitted an Inmate Grievance Petition (IGP) to Administrator Lattimore stating that he had been housed in CB#1 since April, 1992, without any 30 or 90 day review, as provided by the LRAA, and that he had submitted several written requests for a review, and that none of his requests had been answered. Mr. Neal placed the IGP in the cellblock institutional mailbox designated for that purpose. Plaintiff's Exhibit A at ¶ 27; Plaintiff's Exhibit 7.

28. Mr. Neal did not receive a review of his housing status by the end of April, May, or June 1993. Mr. Neal received no response to his April 11, 1993 IGP in the months of April, May, or June 1993. Plaintiff's Exhibit A at ¶ 28.

29. On June 21, 1993, Mr. Neal was taken to D.C. General Hospital, due to an injury. When he returned to the Maximum Security Facility on June 29 or June 30, 1993, Mr. Neal was first housed at Cell Block Six until July 8, 1993. Mr. Neal

requested protective custody at his initial Housing Board hearing on July 8, 1993. On October 12, 1993, the Housing Board, with Mr. Neal's consent, determined that Mr. Neal could be transferred to the general population. Soon thereafter Mr. Neal was housed in the general population in CB#7. Defendant's Exhibit #5 - 6; Defendant's Exhibit #7, at 1-3.

30. The conditions in administrative segregation in CB#1 and in the general population were dramatically different during the relevant time period. Conditions in CB#1 were much more restrictive than in the general population. Plaintiff's Exhibit A at ¶ 30.

31. In CB#1, inmates were confined to their cells for about 15 hours in a 24 hour period on Mondays, Wednesdays, and Fridays. During the time that inmates were released from their cells they were allowed to spend only 2 hours out of doors, in a small concrete courtyard. Inmates were required to spend the remaining time inside the cellblock. On the other days of the week, conditions of confinement in CB#1 were even more restrictive, due to visiting hours, during which prisoners who did not receive visits were confined to their cells. On Tuesdays and Thursdays, inmates without visitors were confined to their cells for about 17-1/2 hours in a 24 hour period. On Saturdays inmates without visitors were confined to their cells for about 18 hours in a 24 hour period. During the time that inmates were released from their cells they were allowed to spend only 1 hour out of doors. On Sundays, inmates without visitors were confined to their cells for about 19 hours in a 24 hour period and were not allowed any time out of doors. On Tuesdays, Thursdays, Saturdays, and Sundays, prisoners with visitors were allowed to spend up to one hour with their visitors. Visits occurred in the cellblock activity room, which also served as a dining hall, and classroom. Plaintiff's Exhibit A at ¶ 31.

32. In the general population, prisoners were confined to cells for at most 9-1/2 hours in a 24 hour period. During time outside their cells prisoners were allowed to spend about 2 hours out of doors and about 4-1/2 in paid work activity, except on Saturdays and Sundays, when prisoners did not work. On Fridays and Saturdays prisoners were confined to their cells for only about 6-1/2 hours in a 24 hour period. Plaintiff's Exhibit A at ¶ 32.

33. In CB#1, inmates generally were not allowed to leave the cellblock unless they had a scheduled legal or medical visit. Inmates were handcuffed and shackled upon leaving the cellblock. Medical cellblock visits occurred approximately twice a week. Inmates were not allowed to visit the law library, and had only very limited access to legal research materials. Plaintiff's Exhibit A at ¶ 33.

34. In constrast, prisoners in the general population, upon obtaining a pass which normally is freely granted, could visit the law library, the mail room, and the gymnasium, and walk to sick call--all without handcuffs or shackles. Plaintiff's Exhibit A at ¶ 34.

35. During visiting hours at CB#1, inmates were allowed to receive visitors for up to one hour per visiting day. Inmates were not allowed to go to meet visitors; rather, visitors were brought to the cellblock. Plaintiff's Exhibit A at ¶ 35.

36. Although general population prisoners had a visiting schedule similar to that of CB#1, prisoners were not confined to their cells during visiting hours, as they were in CB#1. General population prisoners were notified when they had visitors and were then allowed to walk to the visiting room. Plaintiff's Exhibit A at ¶ 36.

37. Mr. Neal did not receive any 30-day or 90-day review of his protective custody during the entire period that he was housed at CB#1, from around April 3, 1992 to June 21, 1993. Mr. Neal did not receive any responses to his requests for release from protective custody or his requests for a hearing. During most of Mr. Neal's confinement in protective custody, John W. Lattimore was Administrator of the Maximum Security Facility. His custom and practice, like that of his predecessor, Douglas Stempson, was not to afford prisoners in administrative segregation frequent hearings necessary to determine whether they faced a present threat to their safety. Plaintiff's Exhibits 1-9; Plaintiff's Exhibit A; *Byrd v. District of Columbia, et al.*, Civil Action No. 92-0608 (RCL) (D.D.C. Sept. 23, 1993)

38. As a result of his lengthy, restrictive confinement in protective custody, as well as the total lack of response to his requests, Mr. Neal suffered loss of liberty, as well as emotional and mental distress. Plaintiff's Exhibit A.

Respectfully submitted,

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202/328-2244

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